STATE OF MICHIGAN

COURT OF APPEALS

FRANKLIN BANK, N.A.,

Plaintiff-Appellee/Cross-Appellant,

v

ZERO PLUS ADVANTAGE, CHARLES M. YOST, BARBARA YOST and RICK GOLDSMITH,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
April 20, 2001

No. 212712
Oakland Circuit Court
LC No. 95-501163-CZ

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendants Zero Plus Advantage (Zero Plus), Charles Yost and Rick Goldsmith, appeal as of right from the trial court's order of final judgment in favor of plaintiff Franklin Bank, N.A. (Franklin Bank). Franklin Bank cross-appeals from the trial court's order denying post-judgment interest, allocating only one-third of the mediation sanctions to Rick Goldsmith, and finding that defendant Barbara Yost was not unjustly enriched. We affirm in part, reverse in part, and remand.

Charles Yost founded Zero Plus in December 1993 and handled all the day-to-day operations for the company. On December 23, 1993, Charles set up a commercial checking account for Zero Plus at Franklin Bank and designated himself the sole signatory for the account. While in business, Zero Plus contracted with a company called One-2-One Communications (One-2-One) to sign up customers for One-2-One phone service. The agreement between the companies provided that Zero Plus employees would solicit establishments to switch their long distance telephone carrier to One-2-One for use at pay phones. The agreement further provided that One-2-One would pay Zero Plus thirty dollars for each phone that was switched over to the One-2-One service, plus commissions. For various reasons, One-2-One failed to pay the bulk of the money it owed to Zero Plus; thus, Charles Yost borrowed money from his wife Barbara Yost and his friend Rick Goldsmith to maintain ongoing operations of Zero Plus. In exchange for

Rick Goldsmith's initial investment to Zero Plus and his ongoing loans,[1] he received sixty percent of the shares in Zero Plus and promissory notes for the loans. Barbara Yost received no shares of Zero Plus, but her loans were reflected in promissory notes.

On March 29, 1995, two checks from One-2-One to Zero Plus were endorsed by Charles Yost and deposited into Zero Plus' account at Franklin Bank: check number 663 in the amount of $2,669.46, and another check in the amount of $387.43. Check number 663, dated March 27, 1995, bore a notation in the lower left hand corner, "COMM TRUE UP REPLACE CK #." On April 1, 1995, Zero Plus received check number 071693 from One-2-One for $26,694.56, issued through Compass Bank in Mobile, Alabama, and it was immediately deposited into Zero Plus' account at Franklin Bank. Pursuant to Franklin Bank's policy to place a temporary hold on all items over $10,000, Franklin Bank placed a hold on the check until the availability of the funds could be verified. After depositing the check into Zero Plus' account, Charles Yost called Franklin Bank on April 4, 5 and 6, 1995, to determine whether the funds were available for withdrawal. On April 6, 1995, a representative at Franklin Bank informed Charles Yost that the money was in the account. Later that day, Charles Yost withdrew funds from the Zero Plus account at Franklin Bank and bought one cashier's check for $12,000, made payable to Rick Goldsmith, and one cashier's check for $10,000, made payable to Barbara Yost.[2]

On April 7, 1995, the $26,694.56 check was returned to Franklin Bank by Compass Bank after One-2-One stopped payment on it. Because the check was already cashed, the amount of the check was subtracted from Zero Plus' account the same day. This debit caused the Zero Plus account to be overdrawn, and the matter was turned over to Franklin Bank's loss prevention department. There was conflicting evidence in the record regarding when Charles Yost was actually informed about the problem; however, Franklin Bank was eventually informed by a Zero Plus representative that the money could not be repaid.

Franklin Bank filed the instant lawsuit alleging breach of warranty, fraud and unjust enrichment. The complaint alleged that Charles Yost and Rick Goldsmith knew that the check in the amount of $26,694.56 was incorrect and that it should have only been for $2,669.45, the amount of the replacement check. The complaint requested the imposition of a constructive trust over the funds distributed to Rick Goldsmith and Barbara Yost. Zero Plus, Charles Yost, Barbara Yost and Rick Goldsmith filed a counter-complaint alleging that Franklin Bank assured Charles Yost that the funds were available in Zero Plus' account after the check cleared and that there was no possibility of it being dishonored. The counter-complaint asserted claims of estoppel, breach of express warranty, violation of the Consumer Protection Act, conversion and negligence under the Federal Reserve Regulation CC.

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[1] At trial, Goldsmith estimated that he loaned Zero Plus approximately $100,000 throughout his involvement with the company.

[2] Earlier on April 6, 1995, Charles Yost had given a check for $3,000 to his son Kevin Yost who was the operations manager for Zero Plus. On the same day, Kevin Yost cashed the check at Franklin Bank.

Following a bench trial, the trial court issued a written opinion and order, finding that Franklin Bank received the $26,694.56 check in good faith and timely notified Charles Yost that the check was dishonored. The trial court further found that based on the bank's Deposit Account Agreement, Zero Plus was obligated to repay the amount of the dishonored check because it was cashed prior to notification of the stop payment order. The trial court also found that Charles Yost committed fraud because he made material misrepresentations by depositing the $26,694.56 check when he knew the amount was incorrect and that the check number 071693 issued by One-2-One was intended to replace it. Finally, the trial court found that Charles Yost and Rick Goldsmith were unjustly enriched because they knew that the $26,694.56 was paid in error and a replacement check was issued, but Barbara Yost received no benefit from Franklin Bank. The trial court dismissed Franklin Bank's claim against Barbara Yost and imposed a constructive trust on the funds received by Charles Yost and Rick Goldsmith. The trial court subsequently denied Charles Yost's and Rick Goldsmith's motion for JNOV and new trial.

In response to Franklin Bank's motion for entry of judgment, the trial court issued an opinion and order, ruling that Zero Plus and Charles Yost were jointly and severally liable to Franklin Bank for $25,151 plus interest and Rick Goldsmith was jointly and severally liable to Franklin Bank for $12,000 plus interest. A constructive trust was placed over those amounts. The order further stated that Franklin Bank was entitled to $33,017.07 in attorney fees and expenses. The trial court ruled that Zero Plus and Charles Yost were jointly and severally liable to Franklin Bank for two-thirds or $22,011.38 of the total award of attorney fees and Zero Plus and Rick Goldsmith were jointly and severally liable for one-third or $11,005.69 of the attorney fees award. The trial court also awarded Franklin Bank interest under MCL 600.6013(6); MSA 27A.6013(6), but declined to award Franklin Bank twelve percent annual interest for a judgment rendered on a written instrument under MCL 600.6013(5); MSA 27A.6013(5). A stipulated order for final judgment was entered by the trial court on June 5, 1998.

On appeal, defendants contend that the trial court erred in finding that Rick Goldsmith was unjustly enriched because he did not engage in or know about any wrongful conduct. We disagree. This Court reviews a trial court's factual findings for clear error. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed." *Id.*

Generally, a plaintiff has a right to reimbursement if a person has possession of money "which in equity and good conscience belongs to the plaintiff." *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999), quoting *Hoyt v Paw Paw Grape Juice Co*, 158 Mich 619, 626; 123 NW 529 (1909). To prove a claim of unjust enrichment, the plaintiff must show that (1) the defendant received a benefit from the plaintiff and (2) defendant's retention of the benefit would result in an inequity to the plaintiff. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991).

Rick Goldsmith contends the trial court could not have found he was unjustly enriched because he had no knowledge that the $26,694.56 check would be dishonored and there was no evidence of wrongdoing on his part. However, Michigan law does not require a showing of knowledge or improper conduct to find that a party was unjustly enriched. The evidence is

undisputed that Rick Goldsmith received a certified check for $12,000 from Zero Plus written off its account at Franklin Bank. Even if he did not know that One-2-One stopped payment on the check, the trial court did not clearly err in finding that it would be inequitable for him to keep the money, particularly in light of Franklin Bank's total loss and the fact that Rick Goldsmith did not show a change of position or detrimental reliance due to the disbursement. Further, Rick Goldsmith owned about sixty percent of Zero Plus and Franklin Bank's deposit account agreement stated that the account holders were responsible for repaying amounts paid from dishonored checks. Thus, despite the absence of any specific knowledge that the check would be dishonored, it was nonetheless inequitable for Rick Goldsmith to retain the funds. Accordingly, the trial court's finding that Rick Goldsmith was unjustly enriched was not clearly erroneous.

Defendants next contend that reversal is required because the trial court relied on evidence not admitted at trial and denied their motion for new trial on this basis. We disagree. Reversal is not required for the erroneous consideration of documents not admitted into evidence unless the "error operated to substantially prejudice the party's case." *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). A trial court's denial of a motion for a new trial is reviewed by this Court for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 539; 564 NW2d 532 (1997).

At trial, plaintiff's Exhibit B was a copy of check no. 663, containing the notation "COMM TRUE UP REPLACE CK #." Defendants' Exhibit 2 was a copy of the same check no. 663, but defense counsel specifically stated that he did not wish to offer it for admission at trial.[3] According to the trial court and both parties, defendants' copy of check no. 663 that was viewed and considered by the trial court, but not admitted into evidence, contained the notation "COMM TRUE UP REPLACE CK # 71693." Check no. 071693 was the check from One-2-One to Zero Plus for $26,694.56.

In its written opinion, the trial court specifically referenced the notation on check no. 663, including the "71693" portion, as direct evidence that Charles Yost had knowledge that check no. 663 in the amount of $2,669.45 was meant to replace check no. 071693 in the amount of $26,694.56, and should not have been cashed. The trial court stated:

> Defendants assert that no direct evidence suggests that any of the named defendants or Kevin Yost has any reason to believe that One 2 One would issue a stop payment on the check. Defendants Findings of Fact and Conclusions of Law at 9-10. The court does not agree. Charles Yost received two checks in this matter. The first check deposited, as discussed *supra*, contained a notation: "COMM TRUE UP REPLACE CK #71693". Defendant's Ex. 2, Plaintiff's Ex. B. The fact that it replaced a check actually bearing the number 071693 is of little consequence. It is clear to this court that the numbers are substantially similar. For the reasons articulated *supra*, the court finds Charles Yost's testimony that he did not notice the notation to be incredible.

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[3] Apparently, the parties agreed that the copy of check no. 663 with "71693" on it was altered by One-2-One after the fact.

In the trial court's subsequent opinion denying Charles Yost's motion for a new trial, the trial court reiterated that "[t]he fact that it [check no. 71693] replaced a check actually bearing the number 071693 is of little consequence" and found that "[t]he import of the notation is the notification that the check is a replacement check and that the face of the check specifically so provides." The trial court also listed other reasons Charles Yost must have known that check no. 663 was a replacement for the prior check and thus lied to Franklin Bank, noting that Charles Yost testified that he saw the notation on the check and the amount of the checks contained similar numbers. Thus, the trial court found that Charles Yost's testimony that he was owed money by One-2-One and did not know check no. 663 was a replacement was incredible. The trial court ruled that its consideration of the wrong copy of the check was harmless.

After reviewing the entire record, we conclude that although the trial court erred in considering the copy of the check that was not admitted into evidence when finding that Charles Yost perpetrated a fraud on Franklin Bank, because a finding of actual knowledge was not required for the trial court to find Charles Yost liable in fraud, reversal is not warranted. A claim of fraud requires proof of the following elements: (1) the defendant made a material representation, (2) the representation was false, (3) the defendant knew, or should have known, at the time of the representation that it was false, or that the representation was made recklessly without knowledge of its truth as a positive assertion (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 MW2d 546 (1999); *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998); *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996).

Here, the record reveals that the trial court did not rely solely on the replacement check in reaching its decision; rather, its determination was based on all the evidence presented, including Charles Yost's inconsistent trial testimony and his admission that he signed an affidavit that he knew contained inaccuracies. Thus, despite consideration of the wrong check, the trial court reasonably found that Charles Yost should have known his representations to Franklin Bank about the check were false or that he made the representations in a reckless manner. This Court defers to the trial court's assessment of the evidence presented and the credibility of witnesses. *Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 569; 595 NW2d 176 (1999). Although the trial court erred in considering the copy of the check that was not admitted into evidence, the error did not operate to substantially prejudice Charles Yost's case because the trial court properly found, based on all the evidence at trial, that the elements of fraud were proven by clear and convincing evidence. *Phillips, supra* at 402. Accordingly, the trial court did not abuse its discretion in denying Charles Yost's motion for a new trial on this ground.

Next, defendants contend that the trial court erred in combining expenses with attorney fees in its award of mediation sanctions to Franklin Bank. We disagree. This Court reviews a trial court's award of attorney fees for an abuse of discretion. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 330; 602 NW2d 633 (1999).

Pursuant to MCR 2.403(O)(1):

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation.

Actual costs include:

> [A] reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation. [MCR 2.403(O)(6)(b).]

Franklin Bank separately requested taxable costs for witness fees, pretrial proceedings and trial. Franklin Bank also listed "expenses" as a mediation sanction. This Court has previously held that expenses incurred by attorneys may be considered when a trial court calculates reasonable attorney fees for purposes of mediations sanctions. *Michigan Basic Property Ins Ass'n v Hackert Furniture Dist Co, Inc*, 194 Mich App 230, 236-237; 486 NW2d 68 (1992). Therefore, the trial court did not abuse its discretion in combining expenses with attorney fees in its award of mediation sanctions to Franklin Bank. *Id.* See also *Temple v Kelel Dist Co, Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990).

In its cross-appeal, Franklin Bank contends it was entitled to twelve percent interest pursuant to MCL 600.6013(5); MSA 27A.6013(5), rather than the standard rate contemplated in MCL 600.6013(6); MSA 27A.6013(6). We disagree. Issues of statutory interpretation are questions of law subject to de novo review. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998).

MCL 600.6013(5); MSA 27A.6013(5) provides, in pertinent part:

> For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest.

In contrast, MCL 600.6013(6); MSA 27A.6013(6) provides, in pertinent part:

> Except as otherwise provided in subsection (5) and subject to subsection (11), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

Franklin Bank contends that the judgment in this case was rendered on a "written instrument" because Franklin Bank provides its customers with a deposit account agreement that explains the bank's various rules and policies. Charles Yost testified that he signed a card indicating he received a copy of the agreement, but denied ever receiving one when he opened the account for Zero Plus.

In *Yaldo, supra* at 345-346, our Supreme Court considered the question of what kind of document qualifies as a "written instrument" for purposes of MCL 600.6013(5); MSA 27A.6013(5), noting that although the definition of "written instrument" was not included by the Legislature, the words were clear and unambiguous. The Court held that a "written instrument" under the statute was not intended to be narrowly defined only as a "negotiable instrument." *Id.* at 346. The Court held that because written contracts and insurance contracts have been referred to as "written instruments" in Michigan, an insurance policy would fit under the unambiguous language of MCL 600.6013(5); MSA 27A.6013(5). *Id.* at 346-347.

However, even if the Deposit Account Agreement in this case constitutes a written contract between the parties, MCL 600.6013(5); MSA 27A.6013(5) does not apply because judgment was not rendered thereon. The claims by Franklin Bank in this case were for breach of warranty, unjust enrichment and fraud, not for breach of the deposit account agreement. Thus, under the plain language of the statute, Franklin Bank is not entitled to twelve percent interest. Cf. *Everett v Nikola*, 234 Mich App 632, 639; 599 NW2d 732 (1999).

Franklin Bank next contends that the trial court erred in allocating only one-third of the mediation sanctions to Rick Goldsmith. We disagree. This Court reviews an award of fees as mediation sanctions for an abuse of discretion. *Michigan Basic, supra* at 234.

Franklin Bank argues that because MCR 2.403(O)(1) provides that a rejecting party must pay the "actual costs," the trial court was precluded from allocating the costs between the parties and all parties should be jointly and severally liable for mediation sanctions. Both parties cite *Michigan Basic, supra* at 230, as controlling authority. Franklin Bank correctly argues that *Michigan Basic* supports the proposition that a defendant rejecting mediation may be responsible for attorney fees incurred for preparation or trial time attributable to other defendants. However, *Michigan Basic* does not require defendants to be jointly and severally liable for all attorney fees and the court rule is silent on the matter. In fact, the *Michigan Basic* Court approved the trial court's reasonable apportionment of attorney fees for which the plaintiff in that case was responsible. *Id.* at 236.

In this case, the trial court did not abuse its discretion in apportioning the mediation sanctions. While Rick Goldsmith could not avoid paying for certain fees by arguing that Franklin Bank would have had to incur those same expenses in any event, it was not unreasonable for the trial court to determine that certain expenses were unnecessary to Rick Goldsmith's case. The primary allegation against Rick Goldsmith was unjust enrichment; he was not involved in Franklin Bank's claim of fraud against Charles Yost. Additionally, while some of the evidence presented was essential to Rick Goldsmith's defense, much of it focused primarily on the claims against Zero Plus and Charles Yost. On this record, we conclude that the trial court's ruling that Rick Goldsmith pay only one-third of the mediation sanctions was not an abuse of discretion.

Finally, Franklin Bank contends that the trial court erred in finding that Barbara Yost was not unjustly enriched because she did not receive a benefit from Franklin Bank. We agree.

As noted above, to prove a claim of unjust enrichment, the plaintiff must show that the defendant received a benefit from the plaintiff and that the defendant's retention of the benefit

would result in an inequity to the plaintiff. *Dumas, supra* at 546. In this case, the trial court found that Barbara Yost believed that the money she received from Charles Yost after the $26,694.56 check was cashed constituted a payment for debts owed to her by Zero Plus. The trial court also found that no credible evidence showed that Barbara Yost "did not believe, in good faith, that she was receiving payments for debts owed by the corporation." However, as noted above, a showing of knowledge or bad faith is not an element of unjust enrichment. Although Barbara Yost was not an owner of Zero Plus, her loans to the company were secured by promissory notes signed by her husband Charles Yost, who was an owner of Zero Plus; thus, she had a relationship with and received a benefit from the company, albeit indirectly. More significantly, Barbara Yost's receipt of money from Zero Plus out of the account at Franklin Bank conferred a benefit upon her that resulted in an inequity to Franklin Bank. Thus, the elements of unjust enrichment were satisfied and the trial court clearly erred in its finding to the contrary. Accordingly, we reverse the trial court's dismissal of this claim against Barbara Yost and remand for further proceedings on this issue.

Affirmed in part, reversed in part, and remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder